



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 13, 1996

Mr. Darrell W. Corzine
McMahon, Tidwell, Hansen,
Atkins & Peacock, P.C.
4001 East 42nd, Suite 200
Odessa, Texas 79762

OR96-1427

Dear Mr. Corzine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100201.

The Ector County Independent School District ("the district"), which you represent, received a request for a copy of the final contract between the district and HealthSmart Preferred Care Incorporated ("HSPC"), together with any and all documents presented to or considered by the district in regard to the proposed or completed transaction between the district and HSPC. The district has released some of the requested information to the requestor, however, the district believes that the remainder of the information may be excepted from required public disclosure. You have submitted the information at issue to this office for review. You assert that parts of the information may implicate the proprietary interests of HSPC and other parts are excepted from disclosure under section 552.111 of the Government Code.

Pursuant to section 552.305 of the Government Code, we notified HSPC of the request for information and of its opportunity to claim that some of the information at issue is excepted from disclosure. HSPC responded by claiming that some of the information is excepted from disclosure under section 552.110 of the Government Code.

You contend that one intraagency memorandum relating to the contract between the district and HSPC is excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Dept. of Public Safety v. Gilbreath*,

842 S.W.2d 408 (Tex. App.--Austin 1992, no writ) and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. The memorandum at issue contains a district employee's advice, recommendations, and opinions regarding the district's contract negotiations with HSPC. The memorandum also contains facts that are severable from the opinion portions of the memorandum. Only the opinion portions of the memorandum are excepted from disclosure under section 552.111. We have marked the memorandum accordingly.

HSPC contends that some of the requested documents are excepted from disclosure under the commercial or financial information prong of section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). HSPC has demonstrated that releasing some of the requested documents would cause it to suffer substantial competitive harm. Therefore, the district must withhold these documents from disclosure under section 552.110.¹ We have marked the documents that are protected by section 552.110.

¹Because we conclude that these documents are excepted from disclosure under the commercial or financial information prong of section 552.110, we need not address HSPC's arguments that these documents are excepted from disclosure under the trade secret prong of section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Karen Hattaway".

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/rho

Ref.: ID# 100201

Enclosures: Marked documents

cc: Mr. James M. O'Leary
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